Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1241

MARLENE WAGNER, MARY ELLEN NORTON, GERALDINE H. BRDAR, WILLA McGUIRE, and FRANCES B. BECTON,

Petitioners,

vs.

BURLINGTON NORTHERN INC., a corporation, and THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARLENE M. WAGNER
P. O. Box 43
Brookfield, Illinois 60513

MARY ELLEN NORTON
5932 South Pulaski Road
Chicago, Illinois 60629

GERALDINE H. BRDAR
4019 Vernon Avenue
Brookfield, Illinois 60513

WILLA McGUIRE
3550 South Rhodes, Apt. 2206
Chicago, Illinois 60653

FRANCES B. BECTON
1025 West Maxwell, Apt. 304
Chicago, Illinois 60608

Pro Se Petitioners

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, made and entered in the above entitled case on October 12, 1977. The petition for rehearing and en banc suggestion was denied on December 8, 1977.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (Appendix A hereto, infra, page 1a) is unpublished and unreported per circuit rule 35. The memorandum opinions of the District Court for the Northern District of Illinois for April 14, 1976 and November 15, 1976 are reported at *Wagner, et al. v. Burlington Northern, et al.*, 411 F. Supp. 537 (1976).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 12, 1977 (Appendix A, infra, page 8a). A timely petition for rehearing and en banc suggestion was denied on December 8, 1977 (Appendix B, infra, page 9a). The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1), Supreme Court Rules of Practice, part 5, 19 para., 1(b).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, under the circumstances of this case, can affirm the judgment of the District Court when both courts have improperly weighed the facts of the case, and the evidence that the Plaintiffs-Petitioners presented both to the Court of Appeals and the District Court.

2. Whether the Court of Appeals can ignore the Supreme Court's intent when *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976) was decided.

3. Whether the disputed questions of facts between the Plaintiffs-Petitioners and the Defendants-Respondents were wrongly interpreted by the District Court which erred reversibly in issuing a Summary Judgment and by the Appellate Court which committed a reversible error when it affirmed the lower court's order regarding questions which can only be equitably answered at trial.

4. Whether the Court of Appeals and the District Court can properly be in conflict with the power and the provisions of the Constitution of the United States to empower Congress "to make all laws . . ." (Art. 1, Sections 1 and 8).

5. Whether the Court of Appeals and the District Court can misinterpret the authority of the *Interstate Commerce Act* (24 Stat. 379, 383; 49 U.S.C. 1-22), and the authority of the *National Labor Relations Act of 1935* (29 U.S.C. 157, 158, 159).

6. Whether the Court of Appeals and the District Court can deny the authority of the Interstate Commerce Commission to regulate "in the public interest" combinations and consolidations of carriers subject to the *Interstate Commerce Act* (49 U.S.C. 5).

7. Whether the Court of Appeals can give proper credence to the validity and terms of Union and Management Agreement, and the necessity that all parties abide by the terms of such agreement.

STATUTES INVOLVED

1. The Constitution of the United States, Article 1, Sec. 1 and Article 8, 5th and 14th Amendments.
2. The National Labor Relations Act, 29 U.S.C. 157, 158(a), and 159(a).
3. The Interstate Commerce Act, 49 U.S.C. 5.

STATEMENT OF CASE

The Plaintiffs-Petitioners in this matter were clerical employees of the Chicago, Burlington & Quincy Railroad Company in March of 1970, when the aforesaid carrier merged with four other carriers, which resulted in the creation of the Burlington Northern Railroad under the Charter of the Great Northern and Burlington Lines, Inc., a Delaware Corporation, hereinafter referred to as the respondent BN, and were members of the Brotherhood of Railway and Airline Clerks, hereinafter referred to as the respondent BRAC.

Prior to the Interstate Commerce Commission's (hereinafter referred to as the Commission) approval of the merger, the several carriers who were trying to effect the merger had met with some 20 months of opposition from the Commission. The Commission had strongly opposed and vetoed any effort of the carriers involved to merge due to the number of adversely affected employees. In an effort to have the Commission reverse its position, the several carriers which were to comprise the respondent BN effected an agreement with the respondent BRAC called the Merger Protection Agreement, dated November 17, 1967 (hereinafter referred to as the Agreement). The stated purpose before the Commission was said to be the protection of the employees and jobs affected by the merger. Article XII of this Agreement provided for a Special Board of Adjustment (hereinafter called the Board). The very first effort of this Board at its preliminary hearings at the Dupont Plaza Hotel, Miami, Florida, on November 28, 29 and 30, 1967, was to article by article review the entire Agreement.

The Plaintiffs-Petitioners were denied the benefits and the protection of the Agreement. Count I—Plaintiffs-Petitioners were not used in comparable jobs as contemplated by the Agreement, and certain plaintiffs were not afforded the opportunity to participate in the respondent BN's lump sum separation allowance program. Count II—Plaintiffs-Petitioners individually protested the respondent BN's contractual violations to the respondent BRAC, but the respondent BRAC, in the person of the Local Chairman, did not heed these protests and the respondent BRAC refused to process grievances on their behalf in violation of its duty of fair representation.

Despite credible affidavits presented by both sides, the District Court granted the respondent's motions for Summary Judgment as to eight of the original 11 plaintiffs. On April 14, 1976 the court permitted three of the plaintiffs to file an amended complaint. On November 15, 1976, the District Court granted the respondents' motions for Summary Judgment as to the remaining plaintiffs.

The Plaintiffs-Petitioners having been denied due process and equitable relief, appealed the lower court's judgment to the United States Court of Appeals for the Seventh Circuit. The trial court's judgment was affirmed on October 12, 1977. The Plaintiffs-Petitioners continued in their efforts to seek equitable relief and filed a petition for rehearing with the Appellate Court which was denied on December 8, 1977.

REASONS FOR GRANTING THE WRIT

I.

The District Court and the Appellate Court incorrectly resolved the issues presented in this matter. Summary Judgment is inappropriate where there exists a genuine issue as to any material fact. In this matter, both parties submitted conflicting affidavits, and the District Court violated a well settled point when it erroneously conducted a trial by affidavit. See *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620 (1944). In so doing, the District Court completely ignored the plaintiffs' exhibits which included copies of the grievances that they had tried in vain to submit to their Local Union Chairman, who refused them in direct violation of the standards embodied in both the *Vaca v. Sipes*, 386 U.S. 171, and *Hines v. Anchor Motor Freight*, 424 U.S. 554 cases. In affirming the trial court's Summary Judgment, the Appellate Court further erred in not applying their own standards as developed in *Zahora v. Harnischfeger*, 404 F. 2nd 172 (7th Cir. 1972) that indicates that Summary Judgment was improper in the matter now before the court.

The reversible error committed by the Appellate Court is clearly shown by this Court's decision in *United States v. Diebold*, 369 U.S. 654 (1962), in that there was and is doubt as to material to the central issues of the case. The District Court's decision reflects a choice of inferences, incorrectly weighing the plaintiffs' exhibits entirely in violation of this court's standards as stated in *United States v. Diebold*, at 369 U.S. 655, which states:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such

materials *must* be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible." (Emphasis added)

Clearly, in light of all of the above applicable standards the Plaintiffs-Petitioners were denied due process as guaranteed by the 5th and 14th Amendments of the Constitution of the United States when the District Court did in fact conduct a trial by affidavit.

II.

The District Court and Appellate Court in this matter have further denied the Plaintiffs-Petitioners their rights under a lawfully existing Union-Management Agreement. The Agreement sets forth specific rights of the Plaintiffs-Petitioners. This Court has in several instances set precedents by openly acknowledging that union-management agreements are not ordinary contracts, but generalized codes that govern a myriad of cases which cannot be wholly anticipated, and often to correctly interpret such agreements, the courts must look to related agreements, as well as practice, usage and custom. See *Transportation-Communications Employes Union v. Union Pacific Railway Company*, 385 U.S. 1032 (1966). There is no limit or rule that should prevent any court from following this court's example when confronted by such matters as involved in this instant case. In the *Chicago & North Western Railway Company v. United Transportation Union*, 402 U.S. 570, this Court, when confronted by vague or unclear statutory language made every effort to determine the true and correct meanings implied in order to secure equitable solution to the matters before it, looked not

only to the Acts involved, but to the very debate that took place on the Railway Labor Act, carefully examining the House hearings, which were quoted at length. The District Court and the Appellate Court chose not to follow this principle embodied in the court's example, but chose rather not to give credence to the plaintiffs' grievances, but to incorrectly weigh the doubt or questions that appear in the Agreement. Both Courts specifically did not apply the principles involved and used by this Court in *Chicago & North Western Railway Company v. United Transportation Union*, 402 U.S. 570. Both respondents as indicated in the Statement Of Case above, entered into an Agreement and further participated in hearings to resolve any doubts regarding the terms of the Agreement. The Plaintiffs-Petitioners expecting equitable relief before the courts, included a copy of these hearings, commonly known as the "Florida Agreement". Neither of the lower Courts apparently gave the Petitioners' exhibits the proper weight and credence, and now only this Court can act to insure the Petitioners equitable relief on these grave and important issues.

III.

In denying the Plaintiffs-Petitioners equitable relief and due process, both the Appellate and the trial Courts have ultimately misinterpreted the Power of the Constitution to create the Congress (Const. Art. 1) which has the Power to enact all legislation (Const. Art. 8) when it enacted the National Labor Relations Act (29 U.S.C.), and the Interstate Commerce Act (49 U.S.C.), which gives the Interstate Commerce Commission authority over "Combinations and Consolidations" of carriers (49 U.S.C. 5(2)). The Agreement grew out of the Com-

mission's veto power and opposition to the proposed merger, due to the large numbers of persons whose terms and conditions of employment would be unilaterally endangered. The actions of the Appellate and District Courts have, in effect, supplanted the terms of the Agreement, irreparably and permanently damaging the position of the Plaintiffs-Petitioners, supplanting the validity of the Union-Management Agreement, ultimately in direct conflict with the basic welfare and interests of the nation.

It is inescapable that the public interest of the nation requires the settlement by this Court of the grave questions involved. The action of the lower courts have imposed, for an indefinite period of time, inequitable changes in the employee-employer relationship which can conceivably result in millions of dollars in damages to all railroad employees, and ultimately affect the economy of the nation. Throughout the proceedings, the petitioners have sought not only monetary, but injunctive relief to prevent the respondents BN and BRAC from taking further irreparable and irrevocable actions which have already inflicted damages upon the Plaintiffs-Petitioners individually and ultimately upon all the respondent BN's employees.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARLENE M. WAGNER
P. O. Box 43
Brookfield, Illinois 60513

MARY ELLEN NORTON
5932 South Pulaski Road
Chicago, Illinois 60629

GERALDINE H. BRDAR
4019 Vernon Avenue
Brookfield, Illinois 60513

WILLA McGUIRE
3550 South Rhodes, Apt. 2206
Chicago, Illinois 60653

FRANCES B. BECTON
1025 West Maxwell, Apt. 304
Chicago, Illinois 60608

Pro Se Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

ARGUED SEPTEMBER 28, 1977—DECIDED OCTOBER 12, 1977.

BEFORE

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 77-1061

MARLENE WAGNER, JUDITH D. HILL, MARY ELLEN NORTON, GERALDINE H. BRDAR, IRMA JONES, WILLA MCGUIRE, FRANCES B. BECTON, BETTYE STUBBLEFIELD and REGINA BROWN,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN INC., a corporation, and THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 683—**John F. Grady**, *Judge.*

ORDER

This appeal involves the interpretation of an employee protection agreement resulting from the merger of five railroads into the Burlington Northern, to determine whether Burlington Northern breached the agreement or a railroad brotherhood breached its statutory duty of fair representation of its members.

I

On November 30, 1967, the Interstate Commerce Commission approved the merger of the Great Northern Railway Company and the Northern Pacific Railway Company and three of their subsidiaries—the Pacific Coast Railroad Company; the Chicago, Burlington & Quincy Railroad Company (Burlington); and the Spokane, Portland & Seattle Railway Company—into what is now the Burlington Northern Inc. (the Company). 331 I.C.C. 228 (1967). A three-judge federal District Court for the District of Columbia affirmed the orders of the Commission in 296 F. Supp. 853 (1968). The judgment of the district court was affirmed by the Supreme Court of the United States in *United States v. Interstate Commerce Commission* (*Northern Lines Merger Cases*), 396 U.S. 491 (1970). The merger was consummated on March 3, 1970.

Section 5(2)(f) of the Interstate Commerce Act provides that the Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected," including a requirement that, for at least the length of his or her prior service up to four years, the merger shall not result in any employee "being in a worse position with respect to" his or her employment. 49 U.S.C. § 5(2)(f). On November 17, 1967, the five merging railroads entered into an employee protection agreement with the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (the Brotherhood). The protection agreement provided that all employees of the five merging railroads "who have an

employment relationship on the date of the consummation of the merger . . . shall be taken into employment by the New Company . . . and shall be continued in compensated service with the New Company . . . until such time as they leave the service of the New Company by natural attrition" (Art. I, Sec. 1(a)).

The employee protection agreement further provided that "[p]rotected [e]mployees who held a regular assignment prior to the date of consummation of the merger shall be guaranteed by the New Company a minimum daily wage equivalent to the daily rate of the last position to which regularly assigned prior to the date of consummation of the merger" (Art. III, Sec. 1(a)). The Supreme Court noted, as the Interstate Commerce Commission had earlier noted, "that agreements entered into by . . . [the merging railroads] and their employees had removed objections of various unions to the merger and that no jobs would be eliminated except in the normal course of attrition." 396 U.S. at 505.

Thus the Company guaranteed the employees more than four years of equivalent employment but in fact a working lifetime of equivalent employment. The employee protection plan was approved by the Commission, by the three-judge court and by the Supreme Court with no objections by the affected unions. Therefore, the terms of the employee protection agreement are final and binding upon the employees involved in the merger.

This action was brought by eleven employees of the pre-merger Burlington against their present employer and the Brotherhood, seeking declaratory and injunctive relief and damages, for alleged breaches of the employee protection plan by the Company and for alleged breach of the statutory duty of fair representation by the Brotherhood. *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202-03 (1944). Nine of the plaintiffs were transferred to different seniority districts than those in which they had previously worked. Two of those plaintiffs did not appeal. Of the seven appealing plaintiffs complaining about transfers, three also complained of

the Company's failure to offer a separation allowance if they chose to resign their positions. The remaining two appealing plaintiffs complained that the Company required them to hold a different type of position involving working conditions which they deemed undesirable. All of the plaintiffs alleged that the Company forced them into a "worse position" with respect to their employment in violation of Section 5(2)(f) of the Interstate Commerce Act.

The district court granted summary judgment in favor of the defendants on April 14, 1976 as to all claims except the separation pay claims of the three plaintiffs. *Wagner v. Burlington Northern, Inc.*, 411 F. Supp. 537 (N.D. Ill. 1976). The court permitted the three plaintiffs to file an amended complaint, which they proceeded to do. The court then granted summary judgment on November 15, 1976 as to the remaining separation pay issue. Nine plaintiffs appealed the two final judgments.

II

In cases such as this where the employees bring an action against their employer for breach of contract and against their union for not fairly representing them in that breach-of-contract claim, "[t]he problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967).

"A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. "[W]here the union actually utilizes the grievance and arbitration procedures on behalf of the employee, the focus is no longer on the reasons for the union's failure to act but on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty

contributed to the erroneous outcome of the contractual proceedings." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 568 (1976). The *Hines* case also added "dishonesty" to the catalogue of ways in which a union could expose itself to liability. 424 U.S. at 570, 571. In other words the employees' success in the judicial process depends first, upon a breach of contract by the employer, second, upon an attempt by the employees to exhaust their contractual remedies, and third, upon arbitrary, discriminatory, bad faith or dishonest representation by the union.

In the present case factual differences existed between the parties as to whether the plaintiffs had exhausted their contractual remedies but the district court concluded that "since we believe the union has acted properly regarding the grievances that have been adequately alleged, we can assume for purposes of these motions [for summary judgment] that plaintiffs have exhausted their remedies within the union" and within the employer protection agreement. 411 F. Supp. at 540. Article XII of the agreement established a Special Board of Adjustment in accordance with Section 3, Second, of the Railway Labor Act to "hear and decide any dispute between the parties hereto involving the interpretation or application of any of the terms of this Agreement. . . ."

III

The pleadings and affidavits before the district court demonstrated that there was no genuine issue as to any material fact and that the defendants were entitled to a judgment as a matter of law. Rule 56, Fed. R. Civ. P.

In regard to the broad claim by all the plaintiffs that the merger placed them in a "worse position with respect to their employment," the district court pointed out that "[n]owhere do plaintiffs allege that the merger resulted in a decrease in their compensation." 411 F. Supp. at 541. The plaintiffs did not controvert the Brotherhood's affidavits that they received or at least

were entitled to receive by filing designated forms their protected wage rate. Brotherhood officials characterized the employee protection plan which "guaranteed [the Burlington employees] lifetime employment at their protected wage rate—provided that certain procedural formalities were met . . . [as] the finest agreement of its type in the railroad industry."

In *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961), the Supreme Court held that Section 5(2)(f) is satisfied by a requirement that employees receive compensation protection. The Court said at 176, 177 and 179:

> [In regard to legislative history] the statements the House conferees gave in explanation of the final version clearly reveal an understanding that compensation, not "job freeze," was contemplated.
>
> * * * *
>
> The indications gleaned from the history of the statute are reinforced and confirmed by subsequent events. Immediately after the section was passed, interested parties—including the brotherhood appealing in this case—expressed the opinion that compensation protection for discharged employees was the intendment of § 5(2)(f). The Commission echoed this interpretation in its next annual report, I.C.C. 55th Ann. Rep. 60-61, and began imposing compensatory conditions, and only compensatory conditions, in proceedings involving § 5 transactions. See *e.g., Cleveland & Pittsburgh R. Co. Purchase*, 244 I.C.C. 793 (1941). The Commission has consistently followed this practice to date in over 80 cases, with the full support of the intervening brotherhoods and the RLEA [Railway Labor Executives Association]; indeed, in one case where a variant of the present dispute arose, the RLEA argued at length that § 5(2)(f) did *not* impose a mandatory job freeze requirement—compensatory conditions would be satisfactory.
>
> * * * *

> In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the signposts of congressional intent, to the extent they are ascertainable, indicate that the administrative interpretation is correct.

We adopt the district court's rationale for the disposition of the claims relating to transfer of seniority districts and different type of position (411 F. Supp. at 541):

> Following the merger, Carrier required the Class I plaintiffs to assume a position in a different seniority district than the one in which they had worked prior to the merger. Plaintiffs were required to move from the Chicago General Offices to offices in Cicero, Illinois. Plaintiffs allege that this violates Article V, Sections 1(d) and 1(e) of the Merger Protection Agreement.
>
> A closer reading of the Agreement reveals that an employee can be moved to a different seniority district as long as the new district was in the home zone of that employee. See Article V, Section 1(d). Since, according to Article IV, the home zone of an employee spans a 30-mile radius, plaintiffs have not been moved outside their home zone. Cicero is in the same home zone as Chicago. Moreover, Attachment 2 to the Agreement explicitly states that Chicago and Cicero are in the same home zone. As to the alleged violation of Article V, Section 1(e), since that section deals with transfers outside the home zone, within the same seniority district, no claim is established here by plaintiffs.
>
> Therefore, on the basis of the merits of this grievance, it does not appear that BRAC's treatment of the grievance was arbitrary, discriminatory or in bad faith.
>
> Next, we consider the claim of the Class II plaintiffs that their move from clerical duties to janitorial duties violated Article V, Section 1(e).

> These plaintiffs make no allegations that these transfers would come within the terms of that section. The uncontroverted affidavit of Robert Curran states that the transfers were within the same home zone and seniority district. Therefore, on this basis, we believe Class II plaintiffs' grievances were meritless and as such required no action by BRAC. In this matter, BRAC has not breached its duty of fair representation.

The final claims related to the question of separation pay or allowance. The grievances of these three plaintiffs were taken to a Special Board of Adjustment as provided in Article XII of the employee protection agreement, which Board found, on August 29, 1975, that the plaintiffs "have not sustained the burden of proving entitlement to separation allowances under the provisions of Article XI" of the employee protection agreement on the ground that "the provisions of Article XI are permissive on the part of the Carrier" and "Protected Employees cannot demand a separation allowance unilaterally."

Both Section 3, Second, of the Railway Labor Act, 45 U.S.C. § 153, second, and Article XII, Section 1(k) of the agreement provide that Special Board awards "shall be final and binding upon both [all] parties to the dispute." To the extent such awards are judicially reviewable, they can be set aside "only for failure to comply with the requirements of the Act, lack of jurisdiction, or fraud or corruption." *United Transportation Union v. Indiana Harbor Belt Railroad Co.*, 540 F.2d 861, 862 (7th Cir. 1976).

The district court held that the Special Board addressed plaintiffs' grievance and therefore "we cannot entertain a suit on the merits of that grievance." The court also found that "the Board complied with the Railway Labor Act, that the Board had jurisdiction and that neither fraud nor corruption was present."

For these reasons the judgments of April 14, 1976 and November 15, 1976 are affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 8, 1977

BEFORE

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 77-1061

MARLENE WAGNER, JUDITH D. HILL, MARY ELLEN NORTON, GERALDINE H. BRDAR, IRMA JONES, WILLA McGUIRE, FRANCES B. BECTON, BETTYE STUBBLEFIELD and REGINA BROWN,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN INC., a corporation and the BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 683—**John F. Grady**, *Judge.*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U. S.
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Respondents.

BRIEF IN OPPOSITION OF THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AN STATION EMPLOYES, LODGE NO. 1047.

SOLOMON I. HIRSH,
6300 River Road,
Rosemont, Illinois 60018,
Attorney for Respondent Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

Of Counsel:
WILLIAM J. DONLON,
6300 River Road,
Rosemont, Illinois 60018.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565 56

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OPINIONS BELOW.

The opinion of the Court of Appeals is unpublished and unreported, per Circuit Rule 35. It is reprinted in an appendix at the back of the petition, pp. 1a-8a. The memorandum opinion of the District Court granting defendants partial summary judgment, dated April 14, 1976, is officially reported at 411 F. Supp. 537. The memorandum opinion granting defendants

summary judgment on the amended complaint subsequently filed by three of the original plaintiffs is unreported and unpublished.[1] The opinions of the District Court have not been reproduced by petitioners, so are reproduced in Appendices A and B herein.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals properly affirmed the determination of the District Court that, based on the record before it, there was no genuine issue as to any material fact and that the case was ripe for summary judgment.

2. Whether the Court of Appeals correctly concluded, in agreement with the District Court:

(a) that the job assignments given to petitioners by the Employer did not violate the Merger Protection Agreement between the Employer and the Union, and did not "put them in a worse position with respect to their employment" within the meaning of § 5(2)(f) of the Interstate Commerce Act (49 U. S. C. § 5(2)(f)); and

(b) that the Union did not breach its duty of fair representation in its handling of petitioners' grievances.

STATUTES INVOLVED.

Section 5(2)(f) of the Interstate Commerce Act (49 U. S. C. § 5(2)(f)).

Section 3, Second, of the Railway Labor Act (45 U. S. C. § 153, Second).[2]

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1. In their petition, petitioners erroneously state that both district court opinions are reported at 411 F. Supp. 537.

2. Petitioners assert that the National Labor Relations Act is involved (29 U. S. C. § 151, *et seq.*), but that statute does not apply to employers, unions and employes covered by the Railway Labor Act, as are the parties herein. See 29 U. S. C. § 152(2), (3) and (5).

STATEMENT OF THE CASE.

Petitioners are employes of the Burlington Northern Railroad (hereinafter sometimes referred to as "BN" or "Employer") who are represented for purposes of collective bargaining by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter sometimes referred to as "Union" or "BRAC"). The BN is the product of a merger of five railroads, and came into existence March 3, 1970, after this Court gave final affirmance to the ICC's approval of the merger plan. See *United States* v. *Interstate Commerce Commission,* 396 U. S. 491 (1970).

In approving the merger, the ICC approved and adopted the Merger Protection Agreement (hereinafter referred to as "MPA") entered into between the carriers and various labor organizations representing their employes. BRAC is one of the unions that is a party to the MPA, and petitioners are covered by its terms (Pet. App. 2a-3a).

The essence of the MPA is that all employes working for the affected carriers at the time of the merger would be "protected employees" of the BN, entitled to a permanent job at a daily rate no less than the daily rate they were making at the time of the merger, until such time as they might leave the service of the BN by natural attrition. See *United States* v. *Interstate Commerce Commission, supra,* 396 U. S. at 504-505. In exchange for the BN's commitment to employ protected employes for the duration of their working lives, BRAC ceded to BN "the right to place into effect any and all changes necessary to effect an efficient operation of the New Company including the right to transfer work from one position or location to another within a seniority district as well as between seniority districts" (MPA, Article VII, § 1(a)) (Pet. App. 7a).

A protected employe can elect to follow his work, or he can stay behind and take whatever job he can obtain in his craft and class by virtue of his seniority, fitness and ability. If no job is

available for a protected employe who has elected not to follow his work, the MPA provides that he be classified a "utility employe," and that the Employer can require him to take any job in his craft and class in his "home zone"[3] for which he is qualified or has the fitness and ability to become qualified (Resp. App. A2-A3, n. 3).

After the merger, much of the clerical work performed by each of the BN's predecessor lines was consolidated at its headquarters in Minneapolis, Minnesota, resulting in a loss of many jobs in Chicago. Although some Chicago incumbents elected to follow their work, most elected to stay in Chicago. As a consequence, the number of protected clerical employes in Chicago far exceeded the number needed. The excess, which included petitioners, became "utility employees" within the meaning of the MPA.

In August and September 1971, the Employer assigned some of those utility employes, including petitioners Norton, Brdar, McGuire and Becton, to its Cicero facility. This facility, although part of petitioners' home zone, was in a different seniority district. As a result, petitioners were placed at the bottom of the seniority roster at the Cicero office, meaning that they did not have as good a choice of jobs and shifts as employes higher on the seniority roster (Pet. App. 7a).

Petitioner Wagner was not transferred to Cicero, but in August 1973 she was assigned janitorial duties to perform at the Chicago offices (Pet. App. 7a-8a).

Petitioners complained to the Union about their new job assignments: those transferred to Cicero thought that their Employer had improperly denied them their rightful place on the Cicero seniority roster; and Wagner was unhappy with the

3. Article IV, Section 1(a) of the MPA defines a home zone as "the territory set forth in Attachment 2 hereto or the territory within a thirty (30) mile radius surrounding the employe's railroad work or assigned location." Attachment 2 declares that Chicago and Cicero, the two locations involved in this dispute, to be in the same home zone.

work she had to do. In addition, two petitioners, Norton and Brdar, complained to the Union that BN was offering separation allowances to junior employes, and that under Article XI of the MPA, they were entitled to such offers ahead of employes with less seniority (Pet. App. 3a-4a).[4]

The Union declined to process the grievances of the employes transferred to Cicero because they were lacking in merit. Union officials explained that the BN had the right under the MPA to transfer utility employes to other facilities within their home zone, and that they had been given their proper places on the Cicero seniority roster because that facility was in a different seniority district (Pet. App. 5a-8a). The Union also rejected Wagner's grievance for the reason that, as a utility employe, she could be required to do other work in her craft and class for which she had the fitness and janitorial work was within her craft and class (*ibid.*).

The grievances of Norton and Brdar concerning separation allowances, however, were progressed by the Union through every step of the contractual grievance procedure, including final and binding arbitration before a Special Board of Adjustment (Resp. App. A9-A10). The Special Board was established under Article XII of the MPA, pursuant to the authority of § 3, Second, of the Railway Labor Act. Despite the Union's efforts, the Special Board ruled against the claimants, holding that the severance allowance given by the Employer to some employes junior to them did not violate the MPA because those resignations were not solicited for the purposes set out in Article XI thereof (*ibid.*).

4. This Article provides, in relevant part, that the BN "may provide for the payment of allowances to eligible Protected Employes who shall resign from the service so as to create whatever vacancies may be needed to effectively utilize the services of the force of Protected Employes. If the New Company exercises the option provided in this Section, it shall offer the opportunity to resign and accept a separation allowance to Protected Employes in seniority order in the home zone involved . . ." (Resp. App. A10).

In March 1975, while the grievances of Norton and Brdar were still pending before the Special Board, petitioners initiated this action by filing an unverified complaint alleging that the BN had breached the MPA in the manner alleged in their grievances, and that the Union had breached its duty of fair representation by failing and refusing to progress those grievances. Both the BN and BRAC filed motions for summary judgment supported by affidavits setting forth the facts summarized above. Petitioners opposed the motions and filed affidavits of their own, but in only one respect did any of their affidavits contradict the material statements of fact in the affidavits filed by respondents: Northern and Brdar claimed that the grievances submitted to the Special Board were not the same as the grievances they had presented to the Union, but they did not say what the differences were. Evidence submitted by the BN, however, included the official submission to the Special Board and showed that petitioners' grievances were submitted *verbatim* (Resp. App. A11).

On the basis of the record thus made, the District Court granted the motion for summary judgment, and the Court of Appeals affirmed.[5] Both courts found that the grievances concerning the transfers and work assignments were lacking in merit and that the Union's refusal to progress them was not arbitrary, discriminatory or in bad faith.

REASONS FOR DENYING THE WRIT.

The decision of the court below is clearly correct, and there is no issue warranting review by this Court. In their petition, as in their brief to the Court of Appeals, petitioners claim that their affidavits conflicted with those submitted by the Employer and

5. The district court initially granted summary judgment against all the plaintiffs, but gave leave to those whose claims were pending before the Special Board to file an amended complaint (Resp. App. A8). By the time the amended complaint was filed, the Special Board had issued its award, and summary judgment was subsequently granted with respect to the amended complaint (Resp. App. A12).

the Union, but here, as in the court below, they have failed to disclose where the disputed material facts might be found. The Court of Appeals properly affirmed the conclusion of the District Court that there was no genuine issue as to any material fact and that the case could be disposed of on a motion for summary judgment. Rule 56, F. R. Civ. P.

The Court of Appeals also correctly found, in agreement with the District Court, that the new job assignments given petitioners did not put them in a "worse position" within the meaning of § 5(2)(f) of the Interstate Commerce Act. This Court has twice held that this provision was designed to protect employe compensation, not jobs, and the court below followed those precedents. See *Norfolk & Western Ry. Co.* v. *Nemitz,* 404 U. S. 37, 42 (1971); *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U. S. 169, 176-177, 179 (1961).

With respect to the Union's duty of fair representation, petitioners have failed to show in what way BRAC's handling of their claims was arbitrary, discriminatory or in bad faith. The grievances that arguably had merit were submitted by the Union to final and binding arbitration, and the grievances that were obviously meritless were declined handling by the Union for that reason. There is not the slightest evidence that the representation afforded petitioners by BRAC was in any way tainted by animosity, hostility, gross negligence or dishonesty. Hence, there is no basis for petitioners' claim that the Seventh Circuit's decision is contrary to this Court's decision in *Hines* v. *Anchor Motor Freight,* 424 U. S. 554 (1976).

Finally, the Court of Appeals correctly affirmed the judgment of the District Court that no basis was shown to exist under Section 3, Second, of the Railway Labor Act for setting aside the award issued by the Special Board with respect to severance pay. Petitioners have come forward with no facts that would impeach the award, and the record demonstrates conclusively that none exists.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

SOLOMON I. HIRSH,
6300 River Road,
Rosemont, Illinois 60018,
Tel. (312) 692-7711,
Attorney for Respondent Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes.

Of Counsel:
WILLIAM J. DONLON,
6300 River Road,
Rosemont, Illinois 60018.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MARLENE WAGNER, ET AL.,
Plaintiffs,
vs.
BURLINGTON NORTHERN, INC., ETC.,
Defendants.
No. 75 C 683

MEMORANDUM OPINION.

This is an action brought by eleven employees against their employer, The Burlington Northern, Inc. (hereinafter "Carrier"), and against their collective bargaining representative, The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Lodge No. 1047 (hereinafter "BRAC"), seeking declaratory relief, permanent injunctive relief and damages. In Count I of a two-count complaint, plaintiffs allege that Carrier violated provisions of a Merger Protection Agreement entered into between Carrier and BRAC in the course of a merger which formed Carrier.[1] In Count II, plaintiffs allege that they have individually protested the Carrier's violations to BRAC, but that BRAC has failed to process their grievances in violation of its duty of fair representation.

1. The merger which resulted in the creation of the Burlington Northern, Inc. was based upon a merger plan filed by The Great Northern Railway Company, The Northern Pacific Railway Company, The Pacific Coast Railroad Company, The Chicago Burlington & Quincy Railroad Company, and The Spokane, Portland & Seattle Railway Company.

Following the merger, nine of the plaintiffs were transferred to different seniority districts than those in which they had previously worked (hereinafter "Class I" plaintiffs). They assert that such a transfer violates Article II, Section 1(a)(1)[2] of the Agreement as well as Article V, Sections 1(d) and 1(e).[3]

2. ARTICLE II—CONSOLIDATION OF SENIORITY ROSTERS
Section 1.

(a) On the date of consummation of the merger, all pre-existing seniority districts (except those exclusively covering seasonal employes) specified in existing collective agreements between the parties signatory hereto and pre-existing seniority rosters made pursuant to such agreements will be cancelled and abolished and new seniority districts and new seniority rosters will be established in the following manner:

(1) All pre-existing seniority districts or parts thereof located within each of the four regions listed below (and shown on Attachment "1" hereto) and the Chicago and St. Paul General Offices shall be consolidated to form a new seniority district and shall be so designated:

(i) *Chicago General Offices*

(ii) *Eastern Seniority District:* Chicago, excluding Chicago General Offices, northward to but not including St. Croix Tower, southward to and including Paducah and St. Louis, westward to Missouri River, Iowa-Nebraska and Iowa-Missouri borders, excluding Council Bluffs and Pacific Junction; and including Atchison and Leavenworth.

(iii) *Central Seniority District:* Westward from Missouri River, Iowa-Nebraska and Iowa-Missouri borders, to but not including Huntley and Fromberg; and including Council Bluffs and Pacific Junction, but excluding Atchison and Leavenworth.

(iv) *St. Paul General Offices*

(v) *Northern Seniority District:* Ashland, Wis., St. Croix Tower and Sioux City westward to and including Opheim, Bainville and to but not including Hesper and Livingston; and excluding St. Paul General Offices.

(vi) *Western Seniority District:* Westward from but not including Bainville; and from and including Hesper and Livingston.

3.

(d) A Utility Employee may be required, upon receiving due notice in writing from the New Company, to take an available regular, relief temporary or seasonal position in his home zone for which he is qualified or has the fitness and ability to become quali-

(Footnote continued on next page.)

Three of these Class I plaintiffs also allege that Carrier failed to offer a separation allowance to them if they chose to resign their positions (hereinafter "Class II" plaintiffs). The remaining two plaintiffs allege that Carrier has required them to hold a different type of position involving working conditions which they deem undesirable (hereinafter "Class III" plaintiffs). These plaintiffs allege a violation of Article V, Section 1(e). All eleven plaintiffs assert that these acts of Carrier have forced them into a "worse position" with respect to their employment in violation of Section 5(2)(f) of the Interstate Commerce Act of 1887, *as amended* 49 U. S. C. § 5(2)(f) (1971).[4]

(Footnote continued from preceding page.)

fied. Available regular or relief positions shall be offered to the Utility Employes in seniority order; however, the requirement to accept the position shall be in the reverse order of seniority. A Utility Employe who refuses to take an available regular, relief, temporary or seasonal position in his home zone for which he is qualified or has the fitness and ability to become qualified shall forfeit all of the benefits of this Agreement commencing with the first day scheduled to work the refused position and continuing until such time as the refused position is discontinued, or unavailable to him, or he secures another available position.

(e) The New Company may, in writing, request a Utility Employe to take an available regular or relief position for which he is qualified or has the fitness and ability to become qualified, in his seniority district which is outside his home zone; however, such requests may only be made in reverse order of seniority to fifty percent (50%) of the number of Utility Employes so employed on January 2 of that year in any given zone or combined zones established pursuant to paragraph (c) of this Section, and then only to Utility Employes who have less than five full years of continuous service on the date this agreement is signed. A Utility Employe requested to accept a regular or relief position for which he is qualified, or has the fitness and ability to become qualified, in another zone in the seniority district must exercise one of the following options within ten (10) calendar days:

(1) Make the transfer with all the benefits contained in Article IX, Section 2 and Article X of this Agreement.

(2) Forfeit all of the benefits of this Agreement for a period of six (6) months.

4. 49 U. S. C. § 5(2)(f) reads:

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad sub-

(Footnote continued on next page.)

Plaintiffs contend that BRAC has failed to properly process the aforementioned grievances. As to the Class II plaintiffs, BRAC has allegedly failed to process the separation allowance grievance to the Special Board created by Article XII, Section 1(a) of the Agreement.[5] As to the remaining plaintiffs, BRAC has allegedly taken no action on their grievances. BRAC in turn denies that these plaintiffs ever filed grievances.

If BRAC provided adequate representation, this Court has no jurisdiction to award relief in this case. The parties will be left to the administrative procedures of the Agreement. If a finding were to be made by the Special Board, we could not review the merits of that finding. *Brotherhood of Railway, Airline and Steamship Clerks* v. *Special Board of Adjustment No. 605,* 410

(Footnote continued from preceding page.)

ject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

5. ARTICLE XII—DISPUTES

Section 1.

(a) On the date this Agreement is made effective, there shall be established, in accordance with Section 3, Second, of the Railway Labor Act, a Special Board of Adjustment hereinafter referred to as the "Board." This Board shall have jurisdiction of and shall hear and decide any dispute between the parties hereto involving the interpretation or application of any of the terms of this Agreement or of any memorandum of agreement made in connection with this Agreement, which is not settled on the property.

F. 2d 520 (7th Cir. 1969). However, if the union failed to act properly, this Court can adjudicate the rights of the parties stemming from the alleged violations of the agreement.

This Court cannot inquire into the adequacy of union representation until it finds that plaintiffs have exhausted their remedies within the union. *Westermayer* v. *Pullman Co.,* 360 F. Supp. 631, 638 (N. D. Ill. 1973). However, since we believe the union has acted properly regarding the grievances that have been adequately alleged, we can assume for purposes of these motions that plaintiffs have exhausted their remedies within the union.

Adequacy of union representation is to be judged by the standard set out in *Vaca* v. *Sipes,* 386 U. S. 171 (1966). The Supreme Court stated, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is 'arbitrary, discriminatory or in bad faith.' " 386 U. S. at 190. In discussing a union's decision not to take its member's grievance to arbitration, the court stated:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. . . .
>
> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation." 386 U. S. at 191.

In judging the action or inaction taken by BRAC against the *Vaca* standard, this Court will focus on the specific grievances which have allegedly been filed by the plaintiffs with BRAC. Our analysis will be divided among the various grievances mentioned above: (1) Changed seniority districts—Class I; (2) changed job positions—Class II; (3) worse position of employment; and (4) failure to offer a separation allowance—Class III.

Following the merger, Carrier required the Class I plaintiffs to assume a position in a different seniority district than the one in which they had worked prior to the merger. Plaintiffs were required to move from the Chicago General Offices to offices in Cicero, Illinois. Plaintiffs allege that this violates Article V, Sections 1(d) and 1(e) of the Merger Protection Agreement.

A closer reading of the Agreement reveals that an employee can be moved to a different seniority district as long as the new district was in the home zone of that employee. See Article V, Section 1(d). Since, according to Article IV, the home zone of an employee spans a 30-mile radius, plaintiffs have not been moved outside their home zone. Cicero is in the same home zone as Chicago. Moreover, Attachment 2 to the Agreement explicitly states that Chicago and Cicero are in the same home zone.[6] As to the alleged violation of Article V, Section 1(e), since that section deals with transfers outside the home zone, within the same seniority district, no claim is established here by plaintiffs.

Therefore, on the basis of the merits of this grievance, it does not appear that BRAC's treatment of the grievance was arbitrary, discriminatory or in bad faith.

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6. ARTICLE IV—HOME ZONES OF PROTECTED EMPLOYEES

Section 1.

(a) The home zone of a Protected Employe is the territory set forth in Attachment 2 hereto or the territory within a thirty (30) mile radius surrounding the employee's railroad work or assigned location.

ATTACHMENT 2

1. Chicago, Cicero, Berwyn, Riverside, Congress Park

Next, we consider the claim of the Class II plaintiffs that their move from clerical duties to janitorial duties violated Article I, Section 1(e). These plaintiffs make no allegations that these transfers would come within the terms of that section. The uncontroverted affidavit of Robert Curran states that the transfers were within the same home zone and seniority district. Therefore, on this basis, we believe Class II plaintiffs' grievances were meritless and as such required no action by BRAC. In this matter, BRAC has not breached its duty of fair representation.

We turn next to the contention of all eleven plaintiffs that their respective transfers have forced them into a "worse position" with respect to their employment in violation of Section 5(2)(f) of the Interstate Commerce Act, as amended 49 U. S. C. § 5(2)(f)(1975). As to the Class I plaintiffs, the worsened position has resulted from a change in seniority district. As to the Class II plaintiffs, the worsened position has resulted from a change in the type of job being performed. Nowhere do plaintiffs allege that the merger resulted in a decrease in their compensation.

In *Brotherhood of Maintenance of Way Employes* v. *United States,* 366 U. S. 169 (1961), the Supreme Court discussed Section 5(2)(f). In that case, employees about to be discharged following a merger were to receive compensation equivalent to their compensation before the merger. This practice would continue for a period of time equal to their previous employment with the company, not to exceed four years.[7] Similarly, employees transferred to a lower paying position were to be compensated for the resulting difference in wages. The employees filed suit, alleging that despite their receipt of compensation, their discharge or transfer to another position was a worsening of their employment position within the meaning of Section 5(2)(f). The Court held that the legislative history of the bill "clearly reveal[s] an understanding that compensation, not 'job freeze' was contemplated." 366 U. S. at 176. The Court added

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7. 49 U. S. C. § 5(2)(f) provides for a maximum of four years. See fn. 6.

that the Interstate Commerce Commission has expressed the opinion that compensation protection was the intendment of § 5(2)(f) and "began imposing compensatory conditions, and only compensatory conditions, in proceedings involving § 5 transactions." *Id.* Here again, therefore, the grievance lacks merit and it cannot be said that in failing to process it, the union has breached its duty of representation. In fact, the union was clearly correct in its decision.

We find it necessary to state that the Court is not placing itself in the position of the union in examining the merits of these grievances. It is not our duty nor is it the proper approach to substitute our judgment for that of the union. We only consider the merits as a means of judging the quality of representation by the union.

Finally, the last grievance to be considered is that of the Class III plaintiffs. They allege the failure of the Carrier to offer them a separation allowance which would give them an opportunity to resign and to forego the benefits of the Agreement. The complaint is silent as to whether in fact these employees would have resigned had such an offer been made and whether they will resign now should such an offer be made. In the absence of such an allegation, the Court does not believe that a genuine controversy exists on this issue. The Court does not feel obliged to issue a mere advisory opinion on this aspect of the case. Accordingly, these plaintiffs will be given leave to amend their complaint on this issue to include such allegations if they can.

It is therefore ordered that defendants' motions for summary judgment on Counts I and II will be granted except as to Paragraphs 8, 9 and 10 of Count I, which plaintiffs named therein will be given 21 days to amend. Defendants shall have 21 days thereafter to plead to any amendment.

Dated: April 14, 1976.

ENTER:

/s/ JOHN F. GRADY
United States District Judge

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MARY ELLEN NORTON, et al.,
Plaintiffs,
vs.
BURLINGTON NORTHERN, INC., et al.,
Defendants.
No. 75 C 683

MEMORANDUM OPINION.

Three employees of defendant Burlington Northern, Inc. ("Burlington") have filed an amended complaint, alleging that Burlington violated a Merger Protection Agreement. They further allege that defendant Brotherhood of Railway and Airline Clerks ("BRAC") breached its duty of fair representation. This complaint was filed following our decision of April 14, 1976, in which we granted summary judgment for defendants, except as to these three employees on the "separation allowance" issue. Defendants have moved to dismiss the complaint. Because matters outside the pleadings are included with the motions, we will treat them as motions for summary judgment.

In support of their motions, defendants state that the grievance of these employees was taken to a Special Board of Adjustment which found that Burlington had not breached its obligations under the Agreement. Awards of special adjustment boards are subject to the type of review set out in Section 3, First (q) of the Railway Labor Act, 45 U. S. C. § 153, First (q). *United Transportation Union* v. *Indiana Harbor Belt*

R. R., 93 L. R. R. M. 2130 (7th Cir. 1976).[1] Accordingly, an award can be set aside only for failure to comply with the Act, lack of jurisdiction, or fraud or corruption. The Seventh Circuit has also held that an award would be unenforceable if it is "actually and undisputedly without foundation in reason or fact." *Laday* v. *Chicago, M., St. P. & P. R. R.*, 422 F. 2d 1168, 1171 (7th Cir. 1970).

Plaintiffs assert, however, that the grievance brought before the Board differed from that which they originally brought to BRAC. Therefore, they maintain we can adjudicate the merits of their grievance. Furthermore, they argue that the failure of BRAC to process their grievance amounts to hostile discrimination by BRAC to which Burlington was a party. We have concluded that the grievance brought to the Board was the same grievance which plaintiffs had brought to the union. We also find that the award of the Board should not be set aside and that no foundation exists for a claim of hostile discrimination. Therefore, defendant's motions will be granted.

The portion of the Merger Protection Agreement at issue is Article XI, Section 1, which provides in pertinent part:

> (a) Inasmuch as the New Company may have an excess number of Protected Employes in any given zone as established by this Agreement, the New Company may provide for the payment of allowances to eligible Protected Employes who shall resign from the services so as to create whatever vacancies may be needed to effectively utilize the services of the force of Protected Employes. If the New Company exercises the option provided in this Section, it shall offer the opportunity to resign and accept a separation allowance to Protected Employes in seniority order in the home zone involved. . . .

1. This decision overruled *BRAC* v. *Special Board of Adjustment No. 605*, 410 F. 2d 520 (7th Cir. 1969), which held that awards of Special Boards of Adjustment were not subject to the review provision of Section 3, First (q).

The findings of the Special Board of Adjustment state that the claims before it involved a request for separation pay in accordance with Article XI because it was contended that some 39 employees, some junior to claimants, in the Chicago zone, tendered their resignations in consideration of an allowance granted outside of the provisions of that Article. The Board found that Article XI is addressed to separation allowances given to create vacancies needed to utilize the services of "Protected Employes," and that the resignation of the 39 employees in the Chicago zone was not requested for the purposes set out in Article XI. The provisions of Article XI were determined to be permissive on the part of Burlington. The Board found that separation allowances pursuant to Article XI were paid to employees senior to plaintiffs, and therefore Burlington did not violate Article XI.

Plaintiffs have attached affidavits to their memorandum which state that the claim they presented to BRAC has not been heard by the Special Board. Plaintiffs do not, however, explain how their grievance differs from the one brought to the Board, and we believe this is because no difference exists. In fact, the exhibit attached to defendant Burlington's motion indicates that the record submitted by defendants to the Board included the letters which plaintiffs had sent to BRAC. Our review of those letters along with the Board's findings satisfies us that the Board did address plaintiffs' grievance. Therefore, we cannot entertain a suit on the merits of that grievance.

Our review of the Board's award is limited to the narrow grounds set out earlier in this opinion. We find that the Board complied with the Railway Labor Act, that the Board had jurisdiction and that neither fraud nor corruption was present. We cannot say that the award was without foundation in reason or fact. Accordingly, the award should be upheld.

Finally, the foundation for plaintiffs' claim of hostile discrimination is the alleged unfair representation by BRAC and Burlington's complicity in such representation. Based on the

exhibits before us and on the fact that plaintiffs' grievance was brought before the Board, we find no support for an allegation of unfair representation within the meaning of *Vaca* v. *Sipes*, 386 U. S. 171 (1967).

Defendants' motions for summary judgment are granted.

Dated: November 15, 1976.

ENTER:

JOHN F. GRADY
United States District Judge

STATUTORY APPENDIX.

1. Section 5(2)(f) of the Interstate Commerce Act (49 U. S. C. § 5(2)(f)) provides:

> As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

2. Section 3, Second, of the Railway Labor Act (45 U. S. C. § 153, Second) provides, in relevant part:

> Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section.
>
> * * *
>
> If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award dispos-

ing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

Supreme Court, U. S.
FILED
APR 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1241

MARLENE WAGNER, MARY ELLEN NORTON, GERALDINE H. BRDAR, WILLA McGUIRE, and FRANCES B. BECTON,

Petitioners,

vs.

BURLINGTON NORTHERN INC., a corporation, and THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Respondents.

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC. IN OPPOSITION

BARRY N. GUTTERMAN
547 West Jackson Boulevard
Chicago, Illinois 60606
Attorney for Respondent Burlington Northern Inc.

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1241

MARLENE WAGNER, MARY ELLEN NORTON, GERALDINE H. BRDAR, WILLA McGUIRE, and FRANCES B. BECTON,

Petitioners,

VS.

BURLINGTON NORTHERN INC., a corporation, and THE BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, LODGE NO. 1047,

Respondents.

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC. IN OPPOSITION

OPINIONS BELOW

The Court of Appeals opinion is unpublished and unreported and said opinion has been reprinted in Appendix A at the back of the petition for a writ of certiorari, pages 1a-8a. The memorandum opinion of the District

Court granting defendants partial summary judgment, dated April 14, 1976, is officially reported at 411 F. Supp. 537 (1976). The memorandum opinion granting defendants' summary judgment on the amended complaint subsequently filed by three of the original plaintiffs is unreported and unpublished. The opinions of the District Court have been reproduced by Respondent Union in Appendices A and B attached to their Brief in Opposition.

QUESTIONS PRESENTED

1. Whether or not the Court of Appeals properly affirmed the District Court's decision that there was no genuine issue as to any material fact and that the case was ripe for summary judgment.

2. Whether the Court of Appeals correctly concluded, in agreement with the District Court:

(a) That the job assignments given to petitioners by the Respondent Burlington did not violate the Merger Protection Agreement between the Respondent and the Union, and did not "put them in a worse position with respect to their employment" within the meaning of § 5(2)(f) of the Interstate Commerce Act (49 U.S.C. § 5(2)(f); and
(b) That the Union did not breach its duty of fair representation in its handling of petitioners' grievances.

STATUTES INVOLVED

Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C., § 5(2)(f)).

Section 3, Second, of the Railway Labor Act (45 U.S.C., § 153, Second).

STATEMENT OF THE CASE

The Respondent Union, in its Brief in Opposition, has stated the facts in this case and, as such, Respondent adopts as its statement of the case the Union's statement of the case at pages 3-6 of the Union's brief. The statement of the case as set forth by the Union is correct, and in an effort to avoid repetition, respondent so adopts the Union's statement of the case.

REASONS FOR DENYING THE WRIT

The petitioners have failed to disclose where there exists a genuine issue as to any material fact. Petitioners have claimed that their affidavits conflicted with those submitted by the respondent and the Union, but the affidavits furnished by the petitioners have been addressed only to the Union and not the respondent. The only allegation by the petitioners against the respondent is that the respondent violated the terms of the Merger Agreement. As such, petitioners have not set forth the disputed questions of fact as between the petitioners and respondent, and the Court of Appeals properly affirmed the decision of the District Court that there was no genuine issue as to any material fact and that the case should be disposed of on a motion for summary judgment. Rule 56 of the Federal Rules of Civil Procedure.

Petitioners, at page 10 of their petition, have stated:

> "The actions of the Appellate and District Courts have, in effect, supplanted the terms of the Agreement, irreparably and permanently damaging the position of the plaintiffs-petitioners, supplanting the validity of the Union-Management Agreement, ultimately in direct conflict with the basic welfare and interests of the nation."

However, the Court of Appeals correctly found, in agreement with the District Court, that the new job assignments given petitioners did not put them in a "worse position" within the meaning of 5(2)(f) of the Interstate Commerce Act. "Worse position" has been construed by the United States Supreme Court to mean wages, and only wages. *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961).

Petitioners have claimed that the Seventh Circuit's decision in the present case is contrary to the United States Supreme Court decision in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). This is incorrect, as there was no evidence that the representation afforded the petitioners by the Union was tainted by animosity, hostility, gross negligence or dishonesty. The petitioners' grievances were submitted by the Union to final and binding arbitration before the Special Board of Adjustment which rendered a decision denying the petitioners' claims (R-2, Exhibit B, Volume 2). Petitioners have not set forth any facts that would impeach the award of the Special Board and there is no basis under Section 3, Second, of the Railway Labor Act for setting aside the award issued by the Special Board with respect to severance pay.

Petitioners have argued that they were denied equitable relief and due process because the decisions of the Court of Appeals and the District Court are in conflict with the power and the provisions of the Constitution of the United States. This is merely a statement by the petitioners without a specific discussion as to how the decisions by the District Court and the Appellate Court conflict with Articles 1 and 8 of the United States Constitution. The seven questions presented by the petitioners in their petition are not fully discussed in the petitioners' reasons for granting the writ, and there are no issues warranting the grant of certiorari by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

BARRY N. GUTTERMAN
547 West Jackson Boulevard
Chicago, Illinois 60606
Attorney for Respondent
Burlington Northern Inc.